Supreme Court, U. S.
FILED
OCT 7 1977
MICHAEL RODAK, JR., CLERK

77-542

IN THE

Supreme Court of The United States

No. A-225

JAMES D. FURRATE,

Petitioner

v.

UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Printed in USA

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, JAMES D. FURRATE, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on March 31, 1977.

OPINIONS BELOW

There was no formal opinion of the District Court. Excerpts of the transcript of that court, including the judge's questions to Petitioner in accepting his plea of guilty and Petitioner's statements at sentencing and at the post-sentencing hearing on the issue of voluntariness of Petitioner's plea of guilty are reproduced in Appendix A to this petition.

No opinion was rendered by the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1977. A timely petition for rehearing was filed on April 19, 1977 and was denied on August 8, 1977. On September 9, 1977, Mr. Justice Powell extended the time for filing petition for writ of certiorari to and including October 7, 1977. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether Rule 11(c) of the Federal Rules of Criminal Procedure will allow the acceptance of Petitioner's plea of guilty to 26 U.S.C. § 7203 without inquiry as to whether Petitioner possessed the mental element for that offense.

2. Whether Rule 11(f) of the Federal Rules of Criminal Procedure will allow the entering of judgment on Petitioner's plea of guilty to 26 U.S.C. § 7203 without inquiry

as to whether Petitioner possessed the mental element for that offense.

3. Whether Petitioner's plea of guilty was accepted in violation of Rule 11(d) of the Federal Rules of Criminal Procedure according to the standard for attorney competence laid down by this court in *McMann* v. *Richardson*, 90 S.Ct. 1441 (1970).

4. Whether the Court of Appeals for the Fifth Circuit violated its duty to Petitioner by failing to raise the issue of the trial court's compliance with Rule 11 on its own motion where the violation was plain on its face as permitted by the plain error rule, Rule 52(b) of the Federal Rules of Criminal Procedure.

STATUTORY AND RULES PROVISIONS OF LAW

Federal Rules of Criminal Procedure

RULE 11(c) ADVICE TO DEFENDANT. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law.

RULE 11(d) INSURING THAT THE PLEA IS VOLUNTARY. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo conten-

dere results from prior discussions between the attorney for the government and the defendant or his attorney.

RULE 11(f) DETERMINING ACCURACY OF PLEA. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

RULE 52(b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Federal Statutes

26 U.S.C § 7201. ATTEMPT TO EVADE OR DEFEAT TAX. Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. § 7203. WILLFUL FAILURE TO FILE RETURN, SUPPLY INFORMATION, OR PAY TAX. Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

Petitioner and his wife, BARBARA K. FURRATE, were indicted for failure to file income tax returns and for filing false and fraudulent income tax returns. At the arraignment Petitioner, on the advice of his court-appointed attorney, pleaded guilty to the misdemeanor counts and in return the government dismissed the felony counts. After a short series of questions the district judge accepted Petitioner's plea. Appendix A at pages A2-A7. At the sentencing hearing but before the actual passage of sentence the judge questioned Petitioner concerning information in mitigation of his sentence; Petitioner, however, responded with information elaborating on his understanding of the nature of the charge and the factual basis for his plea. The judge passed sentence. Appendix A at pages A9-A16.

Subsequent to the passing of sentence the court, on its own motion, convened a hearing to determine the voluntariness of Petitioner's plea and to also complete the record for appeal. At this hearing the court-appointed attorney withdrew and was replaced by retained counsel who introduced testimony showing the incompetent representation by the court-appointed attorney.

REASONS FOR GRANTING THE WRIT

The decision of the Fifth Circuit which denies Petitioner the opportunity to replead violates the purpose and spirit of Rule 11 of the Rules of Criminal Procedure, defies the decisions of this Court interpreting Rule 11, and ignores this Court's holdings which define the substantive law for 26 U.S.C. § 7203. First, Rule 11(c) admonishes trial judges not to accept pleas of guilty until they are certain defendants understand the nature of the charge against them. *McCarthy* v. *United States,* 89 S.Ct. 1166 (1969), under-

scored this requirement by insisting that this understanding be woven into "the record at the time the plea is entered." *McCarthy, supra,* at 1173. In *McCarthy, supra,* as in Petitioner's case, the district court failed to inquire whether the defendant understood the nature of the charge and this court held that this failure compelled reversal. Second, Rule 11(f) forbids the trial judge to enter judgment upon a plea without making sure that a factual basis exists for the plea. *Santobello* v. *New York,* 92 S.Ct. 495 (1971), makes clear that this factual basis must also be woven into the record (*Santobello, supra,* at 498). That the trial judge's failure to abide by these Rule 11 provisions worked a substantial injustice to Petitioner is shown by the substantive law of 26 U.S.C. §§ 7201 and 7203. In *Spies* v. *U.S.,* 63 S.Ct. 364 (1943), this Court, in noting that the word "willful" forms an integral part of the statutory offense, stated about § 145a of the Revenue Act of 1936, the predecessor to 26 U.S.C. § 7203:

> "Had § 145(a) not included willful failure to pay a tax, it would have defined as misdemeanors generally a failure to observe statutory duties to make timely returns . . ."
>
> *Spies, supra,* at 368.

In *Sansone* v. *United States,* 85 S.Ct. 1004 (1965), this Court stated that the misdeameanor "requires only willfulness and the omission of the required act — here the payment of the tax when due." *Sansone, supra,* at 1010. Both decisions recognize that "willfulness" forms a vital part of the offense. The trial judge did not inquire into this vital element of the offense; under *McCarthy, supra,* and *Santobello, supra,* this alone should invalidate the plea. Petitioner's own statements at the sentencing hearing and at the voluntariness hearing fortify this result. Petitioner stated at the sentencing hearing:

> "I didn't know I could file them without sending the money . . ."
>
> Appendix A at page A9.

Petitioner stated at the voluntariness hearing:

> "I thought that it was a misdemeanor filing a late tax return . . ."
>
> ". . . I told him [the district attorney] I really didn't want to fight the government on those charges because I felt that I was guilty of filing my return late, but I had a good reason for doing it."
>
> Appendix A at B14-B15.

These Rule violations take on added zest when considered in conjunction with the allegations of incompetent counsel. Basic to the defense of tax violation charges lies the notion of willfulness. Yet court-appointed counsel believed that Petitioner's only defense was that of "insanity." Appendix A at B52. Petitioner's statement in open court that "I didn't know I could file them without sending in the money . . .", Appendix A at A9, should have easily alerted the court-appointed attorney to the defense of Petitioner's lack of willfulness. Yet, at the time of the subsequent voluntariness hearing the attorney still had not recognized the existence of this defense. In *United States* v. *Easter,* 539 F.2d 663 (1976), the 8th Circuit, relying on *McMann* v. *Richardson, supra,* reversed a conviction for counsel's failure to move to suppress illegally gained evidence by a blatantly unlawful search and seizure. Certainly failure to even advise a client of the element of willfulness constitutes as great a dereliction of duty.

Some concern arises whether the failure to raise the Rule 11 violations in the district court means that these points are not preserved for appeal. The Fifth Circuit has stated in dicta in *United States* v. *Cooper,* 410 F.2d 1128 (5th Cir. 1969), that Rule 11 violations must be raised in the trial court before they can be considered on appeal. This

conflicts sharply with decisions rendered by other circuits. In *Majko* v. *United States*, 457 F.2d 790 (7th Cir. 1972), the Court of Appeals for the Seventh Circuit stated that "it is our duty to review the record for compliance with Rule 11, although Petitioner did not specifically raise the *McCarthy* issue . . ." *Majko, supra,* at 791. Two opinions for the Eighth Circuit agree. *United States* v. *Bradin*, 535 F.2d 1039 (8th Cir. 1976), and *United States* v. *Untiedt*, 479 F.2d 1265 (8th Cir. 1973). The extreme importance of Rule 11 merits a full determination of these questions and urges that these questions — apparent on the face of the record — be considered without presentation to the trial court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit was served upon the Solicitor General, Room 5614, Department of Justice, Washington, D.C. 20530, by United States Certified Mail, return receipt requested, postage prepaid on this day of October, 1977.

LEON S. HIRSCH